IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

Wanda Anita Doolin,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. C 01-41-MJM
	)	
McLeodUSA Network Services Inc.,	)	
	)	**ORDER**
Defendant.	)	
	)	

I. Facts

Before the court is defendant McLeodUSA Network Services, Inc.'s motion to vacate default. *Pro se* plaintiff Wanda Anita Doolin filed this action in federal court on March 19, 2001. Plaintiff filed a similar action against the defendant in Iowa state court on March 9, 2001. Plaintiff served defendant in the state court action on March 21, 2001. Plaintiff served defendant with notice of the federal action on April 9, 2001. On April 30, 2001, the plaintiff sought a default of the state court action. A May 14, 2001 state court order denied plaintiff's request for default because plaintiff failed to send and attach plaintiff's request for default as required by Iowa Rule of Civil Procedure 231. Meanwhile, defendant did not respond to the federal court action within the required twenty day time period. On June 8, 2001, the state court issued

an order informing plaintiff the case would be dismissed if further action was not taken on the case. Plaintiff notified defendant of her intent to seek default judgment on June 26, 2001. The defendant answered the state court petition and pled affirmative defenses on July 6, 2001. On July 13, 2001, plaintiff filed her motion for entry of default in the federal court action. The court entered defendant's default on July 16, 2001. Defendant moved to set aside entry of default on July 27, 2001, and counsel for defendant entered his appearance on the same day. Oral arguments were heard on September 21, 2001. In addition, on August 14, 2001, the defendant removed the state court action to this court. On October 9, 2001, the Honorable John A. Jarvey, United States Magistrate Judge for the Northern District of Iowa, issued an order granting defendant's motion to consolidate the federal and state cases in this court.

II. Entry of Default and Rule 55(c) Relief

Federal Rule of Civil Procedure 55(c) provides: "For good cause shown the court may set aside an entry of default and if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Judgment by default has not been entered in this case and therefore, the only issue before the court is defendant's motion to vacate the entry of default. Consequently, the defendant "is entitled to 'the more lenient good cause standard' here, in considering its motion to set aside, because only a default has been entered, not a default

judgment." *Hayek v. Big Brothers/Big Sisters of America*, 198 F.R.D. 518, 522 (N.D. Iowa 2001) (quoting *Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 784 (8th Cir. 1998)). In determining whether to set aside the entry of default for good cause, a court must look "at whether the conduct of the defaulting party was blameworthy or culpable, whether the defaulting party has a meritorious defense, and whether the other party would be prejudiced if the default were excused." *Johnson*, 140 F.3d at 784.

Ruling on a motion to vacate the entry of default is committed to the discretion of this court. *Johnson*, 140 F.3d at 784. "The entry of a default judgment for a marginal failure to comply with the time requirements . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays." *Id.* (citing *Gross v. Stereo Component Sys.,* 700 F.2d 120, 124 (3d Cir. 1983); *Federal Trade Comm'n v. Packers Brand Meats, Inc.*, 562 F.2d 9, 10 (8th Cir. 1977)). The court acknowledges "[t]here is a 'judicial preference for adjudication on the merits,' *Oberstar v. F.D.I.C.*, 987 F.2d 494, 504 (8th Cir. 1993), and it is likely that a party who promptly attacks an entry of default, rather than waiting for grant of a default judgment, was guilty of an oversight and wishes to defend the case on the merits." *Johnson*, 140 F.3d at 784. For the following reasons, the court grants defendant's

motion to vacate entry of default and the case shall proceed on the merits[1].

III. Analysis

A. Blameworthy or culpable conduct on the part of the defaulting party.

In determining whether the requisite good cause exists to set aside an entry of default, the Eighth Circuit "focus[es] heavily on the blameworthiness of the defaulting party." *Johnson*, 140 F.3d at 784. Generally, the brand of culpability is dispositive of whether Rule 55(c) relief is granted: "Our cases have consistently sought to distinguish between contumacious or intentional delay or disregard for deadlines and procedural rules, and a 'marginal failure' to meet pleading or other deadlines. We have rarely, if ever, excused the former." *Id.* (citing *Hall v. T.J. Cinnamon's, Inc.*, 121 F.3d 434 (8th Cir. 1997)). When a marginal failure to meet pleading deadlines occurs and is accompanied by both a meritorious defense and an absence of prejudice to the non-defaulting party, Rule 55(c) relief is more likely to be granted. *Id.* The idea of culpable conduct incorporates a consideration of qualitative and quantitative factors. The qualitative component looks at the reason for the failure to respond while the quantitative component looks to the length of the delay in responding to the complaint as well as the entry of default. *See Johnson*, 140 F.3d at 784 ("[I]t is likely that a party who promptly attacks an entry of default, rather than

[1] Consequently, vacating the entry of default renders the plaintiff's motion for entry of default judgment moot. (Doc. No. 6).

waiting for a grant of a default judgment, was guilty of an oversight and wishes to defend on the merits.").

The record indicates the defendant did not simply ignore the complaint filed in federal court. Defendant asserts it has good cause for not responding to the federal court action. The good cause, according to defendant, stems from the confusion surrounding the state court action and the federal court action. By way of affidavit, defendant's in-house counsel provided two reasons why defendant did not respond to the federal action. First, defendant stated there was confusion within the human resources personnel regarding the federal court action because defendant was already defending a state court action against the same plaintiff on the same claims. Defendant contends the human resources personnel assumed the litigation was already being handled when in fact the federal action was a separate case. Second, the defendant explained that when the federal action was instituted, the defendant was undergoing a reduction in force that impacted the litigation management department. As a result of the reduction in force, according to the affidavits filed by the defendant, the federal complaint was mislaid during the reduction in force and the person who received service of the federal action is no longer employed by the defendant.

Defendant's in-house and outside counsel, by way of affidavit, contend they were not aware of the pending federal court action. When defendant's in-house counsel learned of the federal action by way of the entry of default on July 25, 2001,

defendant faxed a copy of the entry of default to the defendant's counsel of record in the state court litigation. Defendant contends it moved promptly to set aside the entry of default by filing this motion on July 27, 2001, two days after learning of the federal court action and the entry of default. Defendant contests it was awaiting plaintiff's response to the defendant's state court motion to have plaintiff recast the petition to assess whether removal to federal court was proper. Defendant claims the responses it made to the identical state court action is evidence of its intent to vigorously defend against the plaintiff's claims. The plaintiff filed her recast petition and it became clear plaintiff was seeking relief under federal law. Subsequently, the defendant filed a notice of removal and the case was removed to this court, and later consolidated with plaintiff's federal action. Defendant's affiants state that the human resource personnel likely assumed the plaintiff's federal complaint was already being handled, confusing it with the pending state court petition. While the court does not condone defendant's actions, the court believes the defendant has put forth sufficient evidence supporting the conclusion that the delay in responding to the federal complaint was due to an oversight.

While it is arguable whether the defendant's delay–approximately 10 weeks–in responding to the federal complaint constitutes a marginal failure, the court believes the circumstances surrounding the delay support the conclusion it was a marginal

failure. *See Johnson*, 140 F.3d at 784; *In re Jones Trucking Lines*, 63 F.3d 685, 687-88 (8th Cir. 1995); *United States v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993); *Hoover v. Valley West DM, LP*, 823 F.2d 227, 230 (8th Cir. 1987); *Hayek*, 198 F.R.D. at 522-24. The defendant's affidavits sufficiently explain defendant's behavior and the court concludes defendant's behavior does not appear to be intentional or contumacious. Defendant was actively engaged in defending the state suit, including seeking removal to this court. The action filed in state court alleged the same facts and the same transgressions on plaintiff's rights as the federal suit alleges, and both arise from the same facts–plaintiff's termination. Defendant was unaware there was an action in both federal and state courts and apparently never received any notice of plaintiff's intent to seek entry of default. Given the above, the court concludes the defendant's delay in responding represents a marginal failure to respond and was not intentional nor contumacious.

B. Whether the defaulting party has a meritorious defense.

The second factor courts examine in determining whether to vacate an entry of default is whether the defaulting party has a meritorious defense. *Johnson*, 140 F.3d at 785. Defendant, in its memorandum in support of motion to vacate default, points to its affirmative defenses as reason to vacate the entry of default. Defendant's affirmative defenses, as listed in its answer to plaintiff's recast petition,

are: defendant terminated plaintiff's employment for legitimate, non-discriminatory business reasons, and plaintiff has failed to state a claim for which relief may be granted. It is important to note the defense need not be uncontested or necessarily persuasive: "[T]he issue is whether the proffered evidence 'would permit a finding for the defaulting party,' not whether it is undisputed." *Johnson*, 140 F.3d at 785 (quoting *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988)). Similarly, the defense need not be "absolutely convincing" but it "must be sufficient to generate a factual or legal question as to the merits of the claim against the defendant." *Hayek*, 198 F.R.D. at 524. The court believes the defense raised by the defendant meets this threshold. The defendant's affirmative defense of terminating the plaintiff for legitimate business reasons, at a minimum, could create a factual or legal question regarding the merits of the plaintiff's claim and could permit a finding for the defendant. Defendant has presented the court with a meritorious defense, as that term is defined by case law, providing support for the decision to vacate the entry of default. *See Johnson*, 140 F.3d at 785; *Augusta Fiberglass Coatings, Inc.*, 843 F.2d at 812; *Hayek*, 198 F.R.D. at 524.

C. Whether the other party would be prejudiced if the default were excused.

The defendant argues the plaintiff will suffer no prejudice if the entry of default is set aside. In considering this factor, the court must consider whether the prejudice

to the plaintiff is concrete, that is, whether there is a risk of "'loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion.'" *Johnson*, 140 F.3d at 785 (quoting *Berthelsen v. Kane*, 907 F.2d. 617, 621 (6th Cir. 1990)). "[P]rejudice may not be found from delay alone or from the fact that the defaulting party will be permitted to defend on the merits." *Id.* The court sees no risk of prejudice, concrete or abstract, to the plaintiff if the plaintiff is required to litigate this case on the merits and the defendant is permitted to defend this case on the merits. If a trial is held on the merits, there is no threat of a loss of evidence, increased difficulty in discovery, nor an opportunity for fraud or collusion.

III. Conclusion

Defendant has shown the requisite good cause to set aside the entry of default. The court concludes, in light of the circumstances surrounding the pending federal and state court actions, there was a marginal failure to reply on the part of the defendant, the defendant has presented a potentially meritorious defense, and the plaintiff is not prejudiced by litigating her case on the merits and allowing the defendant to defend the case on the merits. Therefore, for good cause shown by the defendant, the court grants defendant's motion to vacate the entry of default.

Done and so ordered this _____ day of November.

_____
Judge Michael J. Melloy

United States District Court
Northern District of Iowa